

## IN THE SUPREME COURT OF THE HAWAIIAN ISLANDS.

JUNE TERM, 1896.

HALIEKA SQUIRES, FRANCES E. JACKSON and ANDREW P. JACKSON, her husband v. GASPER SYLVA.

EXCEPTIONS.

FREAR AND WHITING, JJ. AND J. Q. WOOD, ESQ. OF THE BAR, IN PLACE OF JUDD, C.J., DISQUALIFIED.

SUBMITTED JULY 2, 1896. DECIDED SEPT. 28, 1896.

Exceptions to findings of fact of a trial Justice overruled, the findings not being clearly contrary to the evidence.

OPINION OF THE COURT, BY J. Q. WOOD, ESQ.

This case of ejectment originally came before Mr. Chief Justice Judd, jury being waived, and a decision for the plaintiffs was given. Exceptions to this decision were duly taken by the defendant on the ground that the findings of fact in favor of the plaintiffs were contrary to the evidence and the weight of the evidence.

The question is simply one of boundary. The plaintiffs' lands were surveyed in 1850, the defendant's in 1853. The Papa Grant, land of defendant's, was surveyed by J. S. Emerson, Senior, and upon this survey was based the grant. This grant calls for a strip of land beginning at the southwest corner of Emerson's Grant (240) and extending 100 chains southwesterly, 10 chains northwesterly, 100 chains northeasterly, and 10 chains southeasterly to the starting point.

The exact point of starting in this survey is a vital one. Where did Mr. Emerson begin? The plaintiffs put in evidence the field notes of Emerson, Senior. These notes are as follows: "Begun at William's (meaning Wm. S. Emerson's lot, Royal Patent No. 240) S. W. bound, from thence laid off for Papa (Royal Patent No. 1784) one lot of 10 chains (meaning a lot ten chains wide) to a gray stone on pali, ranged from pale of stones on plain between two bluffs."

With these notes Mr. Rowell, a surveyor who testified for the plaintiffs, attempted to get the southerly boundary of the plaintiffs' land which is the northerly boundary of the defendant's land. He says that he discovered a grey rock, that he could see it from the sea, that it was prominent and that by running the course north from the sea he struck this grey rock and that there was a stone wall in the course ranged from this grey rock to Grant 240, the Emerson Grant. He also states that the distance from the grey rock to the sea is 5 or 6 chains more than the grant calls for.

Mr. Monsarrat, a surveyor who testified for the defendant, discovered a different grey rock but not until he had located it, and then it was discovered to be in the same line as the Rowell grey rock, ranged from the sea to the pali. He started from the road as a base line and followed the metes and bounds in the patents. However, he failed to locate the back line of the Papa Grant, so that there is nothing in his testimony to show that the distance from the grey rock to the back line of the Papa land is 100 chains as called for by the patent.

Mr. Gay, another surveyor for the defendant, stated that his grey rock, the same as located by Monsarrat, was visible and that this was the only grey rock visible. He followed a line from the sea 80 chains until he struck Kalepeamoa and from this point ran a line parallel to the government road. From the map prepared by Mr. Rowell, a line run from this point parallel to the government road would not strike any grey rock, but would run even south of Rowell's grey rock on the pali. Mr. Gay also did not chain the distance from this grey rock to the back line of Papa, although he was employed to survey Papa.

Both rocks are clearly visible from the plain below, the upper or Rowell rock being the more conspicuous of the two. Both rocks are also on the same line ranged from the plain between the two bluffs.

It is difficult to say from the evidence which of these rocks is the "gray stone" mentioned in the field notes. There is some evidence in support of either view. Under such circumstances the finding of fact of the trial justice cannot be set aside.

The exceptions are overruled.

W. R. Castle for plaintiffs.

A. S. Hartwell for defendant.

## IN THE SUPREME COURT OF THE HAWAIIAN ISLANDS.

SEPTEMBER TERM, 1896.

REPUBLIC OF HAWAII v. W. KUHIA (K) AND MUOLO (W).

APPEAL FROM THE DISTRICT COURT OF HONOLULU.

SUBMITTED SEPT. 21, 1896. DECIDED SEPT. 29, 1896.

JUDD, C.J., FREAR AND WHITING, JJ.

The testimony of a clergyman that he was authorized to solemnize the marriage contract, and that he married to another person one of the parties charged with adultery, is admissible and competent evidence.

OPINION OF THE COURT, BY JUDD, C. J.

The defendants were charged with adultery, the said W. Kuhia being a married man. Rev. H. H. Parker was called for the prosecution and testified that he was a minister and married Kuhia and Emily Kohala, in January, 1894, in Honolulu. That he keeps a record of marriages and that he was licensed to perform the marriage ceremony.

The defendants' counsel moved the District Magistrate to strike out the testimony of Mr. Parker on the ground that it did not appear that he was authorized to solemnize the marriage ceremony, no record of such authorization being offered in evidence, and no excuse being offered for not offering the

same. This the Court refused. Defendants' counsel also asked the Court to require Mr. Parker to produce his record of the marriage in question in order that defendants might thereby impeach Mr. Parker's testimony. This was also refused. The Court found the defendants guilty and imposed the sentence; whereupon the defendants appealed to this Court on the points of law as above stated.

In 2 Greenleaf's Ev., Sec. 461, the author says that direct proof of marriage is required upon indictments for polygamy and adultery and in actions for criminal conversation. "Other direct proof is made either by the testimony of a witness present at the celebration, or of the parties themselves, where they are competent."

It appears that seldom the testimony of the celebrant can be procured and so the authorities say that the "celebration is generally proved by the record thereof or by the witnesses present. The latter is considered stronger evidence, but it is not necessary under the rule for the best evidence to produce the record or the celebrant, unless perhaps the other evidence is purely circumstantial." 14 Am. & Eng. Encyc. of Law, p. 523 and cases cited. "The record is a memorandum of the compact, not the compact itself." Woods v. Woods, 2 Curt. Ec. 516, 522, cited in 2 Bishop on Marriage & Divorce, Sec. 271.

The celebrant is certainly a witness to the ceremony and we can conceive of no better evidence than his. The Court did right in refusing to strike out the testimony.

As regards the want of production of the authorization to solemnize marriages. We think it was not necessary to produce it. The principle is that the presumption exists that a person exercising an official function has the requisite authority to exercise it. 1 Greenleaf, Sec. 92, expresses the principle as follows: "All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears." Doe v. Young, 8 Ad. & Ellis, N. S. 62; Plymouth v. Painter, 17 Conn. 585; State v. Abbey, 29 Vt. 60. See Gov. v. Oishi et al., 9 Haw. 641.

It was within the discretion of the magistrate to suspend the trial and order the witness called for the prosecution to produce his record, but it was not obligatory upon him to do so, for it was competent for the defendant to produce the record in Court by a subpoena duces tecum addressed to the celebrant.

The points of law are overruled, and the appeal is dismissed. Dep. Atty. Gen'l E. P. Dole for prosecution.  
A. S. Humphreys for defendant.

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